Salem College *and* Teamsters Local Union No. 789 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 6–CA–13694

March 23, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On November 23, 1981, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, the Union filed exceptions and a brief in support of its exceptions; Respondent filed a brief in support of the Decision of the Administrative Law Judge; and the General Counsel submitted the brief it had filed with the Administrative Law Judge. Respondent filed an answering brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order dismissing the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint in this proceeding be, and it hereby is, dismissed in its entirety.

[1] Under the Board's Rules and Regulations, a party filing exceptions to the rulings, findings, and conclusions of an administrative law judge "shall designate by precise citation of page the portions of the record relied on," Sec. 102.46(b), and any brief filed in support of exceptions "shall contain . . . specific page reference to the transcript and the legal or other material relied on," Sec. 102.46(c). Respondent, in its answering brief, argues that the Board should consider the Union to have waived any exceptions to the Administrative Law Judge's Decision because of the Union's failure to comply with the above-stated rules. Inasmuch as we find no merit to the Union's exceptions, we do not reach the issue of its failure to file exceptions in the manner prescribed by the Rules and Regulations.

[2] The Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: Pursuant to an unfair labor practice charge filed on August 1, 1980, by Teamsters Local Union No. 789 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, against Salem College, herein called Respondent, and a complaint issued by the Regional Director in October 1980, and an answer filed by Respondent, a hearing was held before me in Clarksburg, West Virginia, on April 20 and 21, 1981. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act on July 7, 1980, by entering into an agreement with Columbus Services, Inc., to subcontract maintenance and custodial work previously performed by its employees "without having afforded the Union an adequate opportunity to negotiate and bargain as the exclusive bargaining representative of Respondent's employees with respect to such acts and conduct." The complaint also alleges that on or about July 3, 1980, the Union had requested Respondent to furnish it with a copy of "all correspondence between Respondent and Columbus Services, Inc., concerning the subcontracting . . . and by written request dated July 7, 1980, requested Respondent to furnish the Union with all relevant documents concerning the subcontracting [referred to above]," which it is alleged is relevant to "the Union's performance of its function as the exclusive collective bargaining representative" of the bargaining unit employees, and that Respondent has thereafter refused to respond to such request in violation of Section 8(a)(5) and (1) of the Act.[1]

Respondent's answer admits the alleged agreement to subcontract unit work on July 7, 1980, but denies that the Union was not afforded an adequate opportunity to negotiate the decision to subcontract. Respondent's answer also admits the alleged requests for information but denies the balance of the allegation.

At the hearing the General Counsel was permitted to adduce evidence in support of its theory that the failure to provide adequate opportunity as alleged in the complaint encompassed a fixed intent by Respondent not to reach agreement on the issue of subcontracting. That issue was therefore fully litigated. In its post-trial brief, the General Counsel moved to amend the complaint to allege that Respondent met with the Union "without intending to reach agreement." Inasmuch as the issue was adequately litigated, I grant that motion.

On the entire record in this case, including my observation of the witnesses and their demeanor and in consideration of post-trial briefs, I make the following:

[1] There is no allegation that Respondent failed to bargain, or to provide the Union with an adequate opportunity to bargain about the effects and impact of subcontracting upon the unit employees.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a West Virginia corporation with its office in Salem, West Virginia, is and has been at all material times engaged in the operation of a private 4-year liberal arts college. During the 12-month period ending September 30, 1980, Respondent in the course and conduct of its operations derived gross revenues in excess of $1 million which amount excludes contributions which, because of limitation by the grantor, are not available for operating expenses, and received goods and materials valued in excess of $50,000 directly from points located outside the State of West Virginia.

It is admitted, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

A. *Background*

Pursuant to a Board-conducted election, the Union was certified as the exclusive bargaining agent for Respondent's maintenance employees on July 31, 1979. There were about 26 persons in the unit. On October 9, 1979, a series of 12 or 13 bargaining meetings ensued. No agreement was reached. An economic strike commenced on April 11, 1980, which was supported by the vast preponderance of unit employees. One of the issues separating the parties was that of wages. The Union had proposed a 15-percent increase, whereas Respondent had offered a 7-percent increase. The Union's last wage proposal was made in mid-May 1980 and remained at 15 percent.

Columbus Services, Inc., of New Castle, Pennsylvania (herein called Columbus), is engaged in the business of providing maintenance and custodial services either exclusively or in large part to educational institutions. In early 1979, Columbus decided to seek entry into the West Virginia market. In January 1979, Columbus' agent, Razzano, contacted Respondent's fiscal vice president, Capacola, and attempted to solicit Respondent's interest in its services. He was told to call again in the spring. Razzano made contact next in May 1979, but was again deferred because Respondent was in the process of inducting a new physical plant director. The Union filed its representation petition on June 1, 1979.

Respondent's vice president of administrative affairs, Michael Greer, testified that Razzano placed a telephone call to Greer's office on February 28, 1980, but Razzano was told to call back in late March upon Greer's expected return from an absence from the campus.

On April 17, 1980 (all dates hereinafter are 1980), Greer was called by Razzano and in that telephone conversation Razzano described Columbus' services and desire to expand to West Virginia. Greer indicated that Respondent might be interested in receiving a proposal from Columbus, and Razzano was invited to visit the campus on May 14. On the agreed-upon date, Razzano and two other Columbus representatives met with Greer in his campus office. Greer and Razzano engaged in a conversation for several hours while Razzano's associates toured the campus with representatives of Respondent for the purpose of formulating a proposal. The information conveyed to Greer on that date related to the type of services Columbus offered. Greer supplied Razzano with information as to the number of students and campus facilities. The purpose, of course, was for Razzano to construct a proposal. No commitment was tendered by Greer who was only one of several vice presidents, and who was required to submit recommendations to Respondent's president, James Stam, for decision. There is no evidence that Greer had formulated any recommendation as of May 14.

On May 28, Razzano returned and in a meeting with Greer, at the college, presented Greer with a "feasibility study" and proposed a contract which was then discussed and explained by Razzano. Greer made no tentative commitments to Razzano. In answer to Razzano, Greer explained his limited authority and stated that Columbus' "proposal and feasibility study" would have to be circulated among other responsible persons "in house," and the matter discussed internally. Razzano was told that thereafter Respondent would contact Columbus.

The 107-page "feasibility study" and proposed contract was prefaced by a first page in letter form addressed to Greer from Razzano which, *inter alia*, outlined the contents which consisted of the following entitled sections:

1. General Overview and Conclusions
2. Why Contract Service?
3. Exhibit "A"—Custodial Specifications and Work Program
4. Exhibit "B"—General Maintenance Specifications and Work Program
5. Operations Plan and Organizational Chart
6. References
7. Budget and Cost Comparative Analysis
8. General Maintenance Services Agreement and Contract Price Schedule.

Section 1 contained a nine-page critique of Respondent's maintenance operations. Section 2 set forth nine pages of advantages to be derived from subcontracting. Section 3 specified the frequency of service for all Respondent's facilities and equipment. Section 4 contained a description of the scope of maintenance work, specifications for mechanical operations, inspection and maintenance, an energy conservation program and a cleaning and maintenance responsibilities chart. Sections 5 and 6 are self-descriptive. Section 7 sets forth Respondent's physical plant budget for 1979–80, i.e., the wage rate and direct labor costs of each maintenance employee, supervisors, clerk, etc., and the total direct labor cost in wages, salaries, and fringes, $274,543, and materials and supplies, $126,000, for a total budget of $400,453. Columbus estimated a 7-1-80 to 6-30-81 contact price of $443,400, and projected

prices of $487,740; and $536,514 for the next 2 years compared to what it estimated Respondent would pay if it retained its own operation, assuming increases of 20 percent, 10 percent, and 10 percent for those periods following negotiations with the Union, i.e., $480,544; $528,598; $581,458.

The July 1 commencement date, according to Greer's uncontroverted testimony, was selected by Columbus on the grounds that it coincided with Respondent's fiscal year and without any discussion between Greer and Razzano regarding commencement dates. Greer testified that he made clear to Razzano that Respondent was engaged in collective bargaining and that any subcontract would be subject to negotiations with the Union. Subsequent to May 28, the feasibility study and proposal was circulated among various Respondent administrators. Pursuant to a telephone call from Respondent, a meeting was arranged and held at the college among president Stam, Greer, and several representatives of Columbus on June 17. At the meeting Stam and Greer requested explanations as to several areas of uncertainty regarding various areas of Columbus' proposal and feasibility study. Greer testified that, upon receiving these further explanations on June 17, the Respondent first became "seriously interested" in pursuing a subcontract.

Following the June 17 meeting, Respondent forwarded the proposed Columbus contract to its attorney, Robert Steptoe, for review. On June 20, Steptoe telephoned Greer and sought answers to a series of questions. After consulting Stam, Greer telephoned Columbus on June 20 or 21 to obtain answers to Steptoe's question from Columbus President Morgan. On June 24, Morgan telephoned Greer and informed him that Steptoe's queries had "raised no problems," and advised Greer to have Steptoe re-draft the proposal and to utilize language that he felt would alleviate his concerns. Thereafter, Steptoe redrafted the Columbus proposal.

B. *Notification to the Union*

The president of the Union, John Van Horn, was "in charge" of the Union's contract negotiation efforts, with the assistance of Richard Peluso, a representative of the Eastern Conference of Teamsters. Respondent's negotiations team was headed by attorney Steptoe. Van Horn testified that, at some point during the third week of June (June 16–20), he engaged in a telephone conversation with Steptoe wherein Steptoe advised him that a meeting should be arranged between the Union and Respondent in that Respondent was "thinking about subcontracting" the entire unit work. A meeting date of June 30 was agreed upon. This was the first notification of contemplated subcontracting that the Union received. Thereafter, two bargaining sessions were held between representatives of the parties on June 30 and July 3. At the hearing of this matter the parties entered into a written stipulation of a "complete and accurate" account of those meetings except for one point which will be discussed *infra* concerning an alleged last appeal for contract negotiations on July 3 by Peluso.

On the morning of June 30, prior to the bargaining session, Morgan and two other Columbus agents met with Greer at the college. Greer delivered Steptoe's revisions to them. Costs were further discussed, including Columbus' projected costs for subsequent years. At that point Columbus offered a firm price of $421,000, a reduction from the original estimate of $443,000 for the first year of service. Furthermore, Columbus agreed to fixed prices for 2 years thereafter (i.e., a 9-percent increase of 1981–82, and an 8-percent increase for 1982–83). Greer testified that, on June 30, Respondent had pressed Columbus to make a firm proposal on the price so that Respondent would be able to present the Union with such firm proposal in order that the Union could "respond rationally and knowledgeably in order that they knew what they were talking about." No acceptance of Columbus' offer was made prior to a meeting with the Union.

C. *The June 30 Bargaining Session*

The bargaining session between Respondent's and the Union's bargaining teams was held in the Salem College library conference room between 2 p.m. and 5:10 p.m. Steptoe acted as chief spokesman for Respondent, and he opened the meeting by announcing that Respondent was "considering the possibility of subcontracting because it can obtain this service at a lower price." He stated that Respondent was in the process of negotiating with Columbus but that the price and "some details" were not "settled." He further explicitly advised the Union that Columbus had conducted "preliminary studies of the campus." Steptoe denied accusations by Peluso of discriminatory motivations. In response to Peluso's query as to whether the subcontracting decision was irrevocable despite negotiations with the Union, Steptoe stated that it was not and that Respondent desired to discuss Respondent's reasons for subcontracting. Peluso then claimed that the Union had no obligation to set forth reasons against subcontracting. He asserted that he was present "to settle a strike, that's all." Peluso, when pressed by Steptoe as to whether the Union desired to bargain over the subcontracting issue, declined to do so but rather threatened to file an unfair labor practice charge. Steptoe again urged him to negotiate the subcontracting decision. The union representatives caucused for 1-1/2 hours, during which time Peluso placed several telephone calls. (The Union had access to free use of a telephone in an adjacent private room during the entire negotiations.)

After the caucus, Peluso reiterated the Union's position that it did not wish "to discuss subcontracting," that it desired to discuss only the collective-bargaining agreement and that it would file an unfair labor practice charge and continue the strike with imported "professional pickets" if subcontracting occurred. Peluso refused to answer Steptoe's question as to whether the Union desired to negotiate concerning the effects of subcontracting upon the unit employees. Steptoe next inquired if the Union desired to make any changes in its last bargaining position as set forth at the last bargaining session of May 15. Peluso indicated that although he had nothing specific to offer, upon review there "might be room for movement." A short caucus ensued, after which Steptoe repeated Respondent's position that it was "inclined to explore the possibility of subcontracting with Columbus,"

that it was economically advantageous and that it would provide Respondent with improved service, but that Respondent was still willing to negotiate the decision to subcontract as well as its effects upon employees. He further expressed a willingness to review all "open areas in the collective bargaining negotiations" and make another effort to reach an agreement on a contract "that is as acceptable as the subcontracting deal." He stressed that Respondent was entertaining a "strong inclination to subcontract" and would proceed to resolve the remaining "details" of the subcontract with Columbus. However, he reminded the Union that they were still in negotiations with the Union and that a collective-bargaining agreement was still possible. Peluso responded that the Union had contacted its attorney (presumably during the last caucus), and that their attorney "has no problem with the concept of negotiating [the] subcontracting issue," but that the Union desired to see a copy of the proposed Columbus contract.

Steptoe urged the Union to meet again on July 3 and promised to deliver the proposed contract before that meeting. He stated, "Right now, let's go over the items that are still open on the labor contract. Let's move it because we have a campus to clean up." Thereupon, discussion turned to the nonagreed-upon unit contract proposals. The meeting ended as Setptoe suggested a meeting for July 3, a Thursday, and stated that Respondent intended "to keep talking with Columbus." He stated, "We still think the subcontracting arrangement is best for the college." Peluso then stated: "We also would like copies of all correspondence." Steptoe answered: "We will try to get that too."

Peluso made no request for copies of Columbus' preliminary studies, nor did he request any other specific information.

Subsequent to the meeting on June 30, Steptoe and Greer met and discussed just what documents would satisfy Peluso's request. It was decided that no correspondence existed, i.e., the hand-delivered "feasibility study" was considered by Respondent not to fall within the definition of "correspondence." All other communications between Respondent and Columbus were verbal. The subcontracting proposal, as redrafted by Respondent's counsel and submitted to Columbus agents on the morning of June 30, was copied and supplied to the Union on July 1. Included with that proposal were 23 pages of attachments covering the subjects of vehicle assignment; certain campus facilities; vandalism; renovation; major repairs; prices as modified on June 30; and a "custodial specifications and work program" which, *inter alia*, set forth the beginning of service for all facilities; "Mechanical Specifications" and "Scope of Maintenance Work"; "Energy Conservation Program;" "Cleaning & Maintenance Responsibilities"; and "Plant Operations and Maintenance." Thus the Union was not provided with the portions of the feasibility study concerning the critique of Respondent's operations, the section entitled "Why Contract Service?" which had contained 17 reasons suggested by Columbus for subcontracting, the "General Operations Plan," and the section entitled "Physical Plant Budget and Operations Analysis."

D. *The July 3 Meeting*

On July 3, the same bargaining teams resumed discussions at the same conference room at 9:30 a.m. Steptoe initiated the discussion by asking whether the Union had received the Columbus proposal. Peluso acknowledged receipt but Van Horn had not seen it. A 30-minute recess was taken for Van Horn to review it. The Union did not repeat its request for "correspondence" nor did it ask for any further information during the course of the meeting.

After the recess Peluso commenced the discussion by announcing that the Union desired to make some proposals with respect to the collective-bargaining agreement which he stated "is what the people are interested in." A written union agency shop proviso was then tendered. Steptoe responded by asking whether there were any other proposals. Peluso demanded a response to the agency shop proposal. Steptoe then stated that Respondent remained "strongly inclined to subcontract" the unit work unless the Union could "convince [the Respondent] not to." He stated, however, that a collective-bargaining agreement was not precluded but that Respondent desired to see the Union's entire proposal. At that point the Union submitted a written proposal concerning prohibition of subcontracting, maintenance of standards, and wages for 1980, and they were discussed in that order. As to wages the Union stated that it withdrew its past 15-percent across-the-board wage increase demand and now offered a 7-percent raise plus an equalization of all wages of maintenance employees by raising the lowest wages to that of the highest wage level. Asked whether there were other proposals, Peluso stated that there were other open issues but that they would "fall into line." A caucus was then taken during which Respondent "costed out" the wage proposal. Prior to the caucus, Steptoe had urged the Union to review the Columbus proposal during the caucus. Peluso had stated that he had looked at it and had concluded that it gave no cost advantage to Respondent, to which Steptoe countered that Respondent was prepared to demonstrate that the subcontract offered "financial advantages as well as service advantages."

After the caucus held by the management bargaining team, Steptoe explained to the union negotiators the results of the "costing out" of their proposal. The net result, the Union was informed, was a wage proposal that was 24-percent higher in cost than the preceding union wage offer. Steptoe recited to the Union Respondent's then present direct labor cost, Respondent's 7-percent wage proposal cost, the Union's prior 15-percent wage increase proposal cost, the Union's July 3 wage increase cost, the June 30 Columbus subcontract price offer, and the materials and general and administrative costs. Steptoe then proceeded to demonstrate that the Columbus offer effectuated a total maintenance service cost lower than either the Union's wage proposal or Respondent's wage proposal or even the present wage level. Steptoe explained that Respondent calculated into the total maintenance costs a general and administrative costs figure amounting to 93 percent of the direct labor cost, and a materials cost of $130,000. Peluso immediately challenged the estimated general and administrative

cost as "exaggerated." He asked the number of administrators involved. Steptoe responded that it involved three persons and himself. He stated:

> The 93 percent of labor cost figure is what the government allows and what is allocated for this purpose based upon the college's May 1980 negotiations with G.A.O. concerning the allowable G & A overhead rate, the college could charge the United States government for administration of government grants.

Peluso then obtained an admission that even if the work were subcontracted the administrators would not be "completely free of these duties." Peluso then rejected the 93-percent figure as a "phantom figure" and pointed out that with the materials cost stated by Steptoe the Union's proposal was about $8,000 less than the Columbus package. Steptoe then pointed out that the Columbus offer would include use of Columbus' supervisors and would allow Respondent to eliminate maintenance supervisors that cost Respondent $50,000 a year.[2] Furthermore, he pointed out that there were other reasons for subcontracting and enumerated the following:

1. Better trained employees and skilled supervisors.
2. The good reputation of Columbus.
3. The opportunity to free Greer, an academician without business and managerial background, from overseeing the custodial and maintenance employees
4. The opportunity to obtain better and more comprehensive services, as specified in the Columbus proposal, of which he gave several examples including improvements in the condition of the dormitories of which students had complained.
5. The opportunity to initiate a preventive maintenance system.
6. The ability of Columbus to undertake service contracts with other companies, of which he cited several examples including references to a service contract for heating and cooling, and for fire alarms.
7. The opportunity for Columbus to provide the services of a professional electrician, water treatment for the boilers, specialists in fields relating to maintenance and personal matters, fiscal responsibilities, payroll processing, energy auditors; and that Columbus could assume all responsibility for ordering, purchasing and inventory control of all supplies.

To this exposition Peluso expressed doubt that Columbus could perform at the price it offered. Steptoe explained why he thought Columbus could effectuate its promised performance. Peluso persisted in expressing doubts, and asked if the Union's proposal was rejected. Steptoe stated that it was and concluded:

> The economics of the situation eclipse everything that is on the table because Columbus can offer us a better cost than anything we have now.

Peluso insisted that Columbus' promised performance was "impossible."

The union negotiators did not challenge any estimates set forth by Steptoe other than the 93 administrative costs estimate which Peluso had rejected out of hand as a "phantom figure." The union negotiators did not challenge Respondent's assertion that better and more services could be obtained by subcontracting other than to denigrate in a conclusionary manner Columbus' ability to perform as promised. There was no challenge to the assertion that Respondent needed an improvement in services. There was no debate as to the validity of Steptoe's proffered noneconomic reasons for subcontracting. There was no request for underlying data concerning actual administrative costs or costs of materials. Instead, a caucus was taken.

Upon return from the caucus Peluso stated:

> I guess we have the facts and figures but there is no way in God's world we can agree with them. The strike is going to continue.

Steptoe responded, "We still want to subcontract with Columbus." Steptoe attempted to elicit the Union's intention to bargain "over the subcontract." Peluso stated:

> No, I personally don't feel that there is any need to negotiate it further. Maybe my attorneys will feel differently.

Peluso, when asked by Steptoe, rejected the opportunity to discuss the effects of subcontracting by stating: "No, not at this time." Steptoe then stated that Respondent would continue to communicate with Columbus and "eventually execute a contract," unless the Union could "talk" Respondent out of it. He asked if the parties met the next day, or thereafter on Saturday, whether the union negotiators would "be in a better position to discuss the subcontracting issue." The following colloquy ensued:

> Peluso: We're not here to discuss the subcontracting issue, we are here to negotiate a labor contract. I'm putting you on notice that if you subcontract, we will file charges at NLRB.
>
> Steptoe: In other words, Dick, you do not want to discuss subcontracting at all, just a contract for these employees.
>
> Peluso: Yes. We thought you came here to discuss a labor contract. You costed it out and then you tell us you are still inclined to subcontract.
>
> Steptoe: We are here to discuss the subcontract, if you want to.
>
> Peluso: My assumption on Monday was we were going to discuss the contract and we brought proposals. You didn't reject them. You only said you were inclined to subcontract.
>
> Steptoe: Do you see any need to meet again to discuss subcontracting?

[2] There were three supervisors, including a director and assistant director of maintenance, and a custodial supervisor. The feasibility study prepared by Columbus failed to consider the custodial supervisor, but it did consider the cost of a clerk-typist employed by the maintenance director.

Peluso: I don't. John [Van Horn] or my attorney might. Do you see any need to further discuss a contract?

Steptoe: I don't see any need to discuss the contract further because the college feels the subcontracting is the best financial deal for it. John, do you see any need to discuss subcontract further?

Van Horn: We feel you are only doing it to be unfair to your people. The way I feel about the subcontract, it's an unfair labor practice. I don't want to discuss subcontracting any more. I want only to discuss a contract for these employees.

Steptoe: Do you want to make any more proposals?

Van Horn: Let's clear up the language of the proposals we made today. Maybe the wages will fall into place. [Respondent took a 5-minute caucus.]

Steptoe: We reject the proposal you made today with regard to subcontracting in its entirety. We do not want to surrender the right to subcontract. Your language, in terms of economic reality, gives up our right to subcontract. With regard to your language on maintenance of standards, we reject it. It gives the Union the right to unilaterally write the contract. We can't accept your wage proposal of today either, because it is excessive and in fact it is an increase from your last demand. We also reject your agency shop proposal of today because it still restricts employees' freedom of choice as to whether or not to pay dues. Our position is still that we want to subcontract and want to talk about it.

Peluso: We think you are acting in bad faith and we want to talk about a contract.

Steptoe: Make another proposal on the contract then.

Peluso: How can we beat the subcontracting idea?

Steptoe: Do you want to make another proposal?

Peluso: [Asked for a caucus which lasted 10 minutes.]

Our final offer today is as follows:

1. The agency shop proposal we presented earlier today.

2. The subcontracting language we presented earlier today.

3. The maintenance of standards language we presented earlier today, except that disputes as to what is a past practice can be submitted to the grievance and arbitration procedure.

4. Plant-wide seniority to permit bumping both ways.

5. During the first year of the contract, all custodians will make $3.50 per hour and all maintenance employees will make $4.30 per hour.

Steptoe: We need a caucus to cost out your new wage proposal. [After this a short caucus took place. During the caucus, Greer and Steptoe calculated the direct labor cost of the Union's new proposal to be $257,379, a 12.6% increase over the college's current direct labor cost of $228,556. This proposal is also $5,000 less than the Union's 15% across-the-board wage demand but is $13,000 more than Respondent's final offer as of April 10 of a 7% across-the-board increase ($224,554). At 3:10 p.m. the caucus ended.]

Steptoe: [He explained their cost analysis as detailed above and told the Union that this most recent demand is higher than Respondent is giving its demand is higher than Respondent is giving its administrative and clerical employees.] Therefore we can't accept your latest wage package.

Peluso: [Peluso questioned their math, especially the statement that the Union's latest proposal is 12.6% above present labor costs. Steptoe showed him how they reached this figure.]

Steptoe: The employer can't accept your final offer but we are still willing to talk about the decision to subcontract and/or the effects. We still feel the subcontract would be the best deal for us but we are still willing to talk to you about it. We will withhold making a decision on the subcontracting until Monday at 10 a.m. If we hear from you by then, we are will to talk more. If we don't hear from you by then, we will assume you don't want to discuss the decision or the effects and we will probably sign a contract with Columbus. I propose that if you want to meet on the subcontracting issue, we could meet at 1 p.m. on Monday.

Steptoe: (Directed to Van Horn) Do you know where to reach me over the weekend?

Van Horn: Yes, I've got phone numbers.

Peluso: I am on vacation Monday but I may send some of my Teamster buddies down to visit you.

Gateman: It's nice down here.

Peluso: It may not be nice when they get here.

There is a discrepancy in the testimony between Van Horn and Greer and Steptoe as to when the July 3 meeting ended; and a dispute as to whether Peluso and Steptoe engaged in a further colloquy wherein Steptoe purportedly stated that Respondent did not desire to negotiate further with respect to a collective-bargaining agreement. In view of Van Horn's unconvincing demeanor, his uncertainty and obscurity in testifying as evidenced in part by hesitancy in responding to questions, and his resort to lengthy pauses when his memory appeared to fail him, I credit the testimony of Greer and Steptoe. I find that the meeting ended between 3:20 and 3:30 p.m., and that no further colloquy took place between Peluso and Steptoe.

The union negotiators made no effort to communicate with an attorney at the conclusion of the meeting despite the availability in an adjacent office of a telephone to which they had resorted during past negotiations. Van Horn testified that the attorney who represented the Eastern Conference of Teamsters is located in Bethesda, Maryland, and normally is not in his office at 5 p.m., and that Van Horn did not have his home telephone number and the Eastern Conference headquarters was closed on July 4. Van Horn attended a 3-day horse show in another part of the State over the holiday weekend. Peluso told him that he had plans to visit Maine commencing that weekend. No attempt was made to contact attorneys in Fairmont or Charleston, West Virginia, who in the

past had rendered service to the Union. Van Horn conceded that he has in the past contacted Steptoe at his house. He conceded that he understood that Respondent was awaiting notice from the Union whether the Union desired further negotiations concerning subcontracting, and that neither he nor Peluso objected to the deadline set by Steptoe. No effort was made to advise Respondent that the Union found the deadline inconvenient, or that either Van Horn or Peluso would not be available over the weekend. It is difficult to conclude therefore that the Union had any intention of pursuing further negotiations as to the subcontracting at the end of the July 3 meeting or throughout the deadline period.

After the meeting on July 3, Greer reported the results of the meeting to President Stam and told him that the Union had indicated no interest in discussing the subcontracting issue but that an offer to negotiate further was held open until 10 a.m., Monday, July 7. Stam told Greer that if the Union failed to request bargaining by that deadline he should proceed and enter into an agreement with Columbus. At 10 a.m., July 7, Greer telephoned Steptoe and was advised that no communication had been received from the Union. Steptoe advised Greer that it was permissible for him to proceed and enter into an agreement with Columbus. Greer then telephoned Morgan and informed him that Respondent agreed to enter into a subcontract with Columbus. It was agreed that the subcontract would be effective on July 7 and the document would be executed on July 9, which it thereafter was. Morgan indicated that he would proceed to send Columbus personnel to the campus that afternoon in order for them to commence recruitment of employees on July 8. In fact, such recruitment took place as promised.

Van Horn testified that on Monday, July 7, at or about 9 a.m., he placed a telephone call to the Eastern Conference attorney's office but was told he was not present but would be expected later. A message was left. At 2 p.m. the attorney telephoned Van Horn. It was not until 3 p.m. that Van Horn telephoned Steptoe and informed Steptoe that the Union was "willing" to negotiate Respondent's decision to subcontract and the effects thereof upon employees. Steptoe reminded him of the deadline and stated that he would communicate with Respondent to determine whether there had been any communication between Respondent and Columbus. At 3:45 p.m. Steptoe communicated by telephone with Greer and inquired whether an oral agreement had been reached with Columbus. He was told that an agreement was reached upon the June 30 proposal. Steptoe inquired as to whether that agreement was binding or whether there were any "loose ends" left open. Greer responded that he felt the agreement to constitute a binding and moral obligation. Greer testified:

> [T]he way we try to do business at Salem is you know, once we give our word, our word is our own word and on July 7th, we committed ourselves to a contract with Columbus Services. —After we had made a good-faith commitment, [to rescind that commitment] was no longer a viable option because we had committed ourselves in a good faith way.

Steptoe thereafter telephoned Van Horn about 4 p.m. on July 7 and informed him that Respondent had committed itself to a subcontract with Columbus. He told Van Horn that Columbus would proceed to send job recruiters to Salem the next day and that the Union ought to send the unit employees to apply for jobs. Van Horn stated that the employees did not desire employment with Columbus. According to Steptoe's more coherent and certain testimony which I credit, he asked Van Horn whether the Union desired to make arrangements for meetings that week for the purpose of negotiating the effects of subcontracting, but that Van Horn indicated that he could not because commitments required his presence elsewhere that week but that Steptoe should write him concerning such dates. According to Van Horn, he asked Steptoe for any "relevant documents pertaining to the subcontracting between Salem College and Columbus." Steptoe recalled the request as occurring during the first conversation with Van Horn on July 7. I credit his testimony as the more certain and reliable.

Thereafter, Respondent refused to negotiate the basic decision to subcontract unit work but offered to negotiate concerning the effects of subcontracting. Some of the former employees applied for jobs with Columbus. All who applied were accepted by Columbus. Some former unit employees who were offered employment by Columbus rejected such offers.

E. *Subsequent Events*

By letter to Steptoe dated July 7, Van Horn again reiterated the Union's desire to negotiate the decision and effects of subcontracting unit work and concluded, "but before we do so, we would like to have a copy of all relevant documents." By letter to Van Horn dated July 8, but prior to receipt of the above letter, Steptoe, *inter alia*, confirmed Respondent's refusal to further discuss the decision to subcontract but invited negotiations as to the effects of the decision to subcontract. He closed by requesting contact at the "earliest convenience." On July 9, Steptoe received Van Horn's July 7 letter. Steptoe testified that he did not know what Van Horn meant by the reference to "relevant documents," and that he intended to obtain clarification at the next negotiation session. On July 10, Steptoe wrote to Van Horn and suggested that Van Horn contact him upon Van Horn's return from a vacation in order to schedule a bargaining session. On July 15, Steptoe wrote to Van Horn and suggested a meeting to discuss the effects of subcontracting on August 5 and requested confirmation of Van Horn's availability. That letter was never received by Van Horn who testified that although he received the July 10 letter he had no recollection of responding to it. Steptoe, fearing that a protracted trial elsewhere might preclude his availability on August 5, attempted to communicate with Van Horn's office and ascertained that his letter of July 15 was not received. On August 5, Steptoe telephoned Van Horn and asked whether they could negotiate on August 7, but Van Horn said he would not be available. Steptoe requested Van Horn to contact him as soon as possible as to when Van Horn might be available. In view of Van Horn's unreliability as a witness noted

above, I credit Steptoe's testimony that Van Horn made no reference to requested documents. For the same reasons I credit Steptoe's testimony that Van Horn did not telephone him and engage in a conversation on August 15, or any other time in August. On September 18, conversation on August 15, or any other time in August. On September 18, Van Horn telephoned Steptoe's office and in his absence left a message to return the call, but upon Steptoe's return to the office Van Horn was no longer available.

On October 1, Steptoe and Van Horn engaged in a telephone conversation. It is not clear who initiated the call. An agreement was reached to meet on October 14. A reference was made by Van Horn to "relevant documents," and explained as "anything that pertains to Salem College, the subcontracting of Salem College and Columbus." Steptoe testified that he was not satisfied with that explanation but that he decided to defer a clarification request until the next meeting.

The meeting set for October 14 was canceled by Steptoe on the morning of October 14. Steptoe testified that he canceled the meeting because of a change in the position of the Regional Director regarding settlement of the unfair labor practice charge, i.e., a *status quo ante* remedy was now demanded as a condition of settlement. Stam and Greer were informed by Steptoe of the Regional Office's position on October 13 and requested that he meet with them to discuss the Region's position. Accordingly, Steptoe cancelled the October 14 meeting with Van Horn in order to visit with Stam and Greer with respect to the Regional Director's position regarding settlement. Steptoe and Van Horn tentatively agreed to meet on October 17 or October 24. Respondent's principal agents were unable to meet on October 17 or October 24, and ultimately the parties met next on November 21.

At the meeting of November 21, Van Horn was present without Peluso and acted as spokesman. Van Horn made several requests. Van Horn asked the duration of the subcontract. He also asked for a signed copy which Steptoe agreed to provide and which was forwarded within 24 hours. Van Horn inquired as to the number of employees Columbus employed at Respondent's facilities and their hourly rate of pay. Steptoe deferred. Steptoe testified that he desired to first obtain approval from Columbus before releasing the information. He subsequently did so during a caucus but Columbus requested that the information not be disclosed and Steptoe did not disclose it to the Union. Van Horn asked whether Respondent's last collective-bargaining agreement was "still on the table." Steptoe replied that it was not as it had been rejected and the subcontracting decision was made thereafter. Van Horn inquired as to what the "effect" would be if the "striking" unit employees offered to return to work, i.e., whether they would be employed by Respondent or Columbus. For reasons previously stated, I find Steptoe the more reliable witness. Accordingly, I credit his testimony that Van Horn was asked whether he was making an offer on behalf of unit employees to return to work whereupon Van Horn said he was not. Steptoe then responded that the question was hypothetical and could not be answered "off the top of my head." Steptoe asked Van Horn if he were ready to proceed to negotiate with respect to the effects of the subcontracting and Van Horn replied that he was not, but preferred to wait until he received a copy of the executed subcontract. Steptoe asked Van Horn whether there was any other "information or documentation" that he needed before the next meeting, but no specific request was made. Steptoe suggested that Van Horn discuss with Peluso a future date for bargaining and that Van Horn contact Steptoe later. Van Horn agreed.

On November 25, Steptoe forwarded with a covering letter to Van Horn the requested copy of the executed contract.

Prior to the November 21 meeting, Respondent had been in receipt of a letter dated October 20 addressed to Greer from Columbus which set forth therein information, including the total number of employees employed by Columbus at Salem, the information that Columbus needed no additional employees, an enumeration of former unit employees who applied for jobs with Columbus, including six employees hired as strike replacements, information that indirect inquiries for employment were made on behalf of former unit employees, the manner in which Columbus solicited job applicants, i.e., news media advertisements, state employment agencies, a termination letter from Respondent to employees showing that Columbus was accepting employment applications, and the information that Columbus did not attempt to contact any former unit employee. Steptoe testified that he did not consider the October 20 letter to constitute a "relevant document." He testified:

> I really didn't understand precisely what the Union was looking for when it said "relevant." That's why I wanted a meeting so I could sound them out on the point and so they could tell me specifically what they were looking for.

Van Horn in a letter dated December 2, addressed to Steptoe, stated:

> Please advise Mr. Mike Greer and Mr. Ted Gateman that the Teamsters Local Union No. 789 accepts the last final offer made by Salem College and will sign a contract between Salem College and Teamsters Local Union No. 789.
>
> Also be advised that upon acceptance by Salem College, the employees on strike will return to work immediately.

By letter dated December 9, Steptoe responded to Van Horn and summarized the discussion of the November 21 meeting concerning the inquiry as to Respondent's last contract offer, and again stated that Respondent's last collective-bargaining agreement offer was "not on the table." Steptoe concluded by stating that he was still waiting for Van Horn's suggested future meeting dates with respect to negotiations as to the effects of subcontracting.

In a letter dated March 16, addressed to Steptoe, Van Horn stated:

> Please be advised that the employees on strike at Salem College are willing to return to work for Salem College at their prevailing wage rate.
>
> The Local Union would like to return to the bargaining table as soon as possible in hopes that we can clear up this situation.
>
> If you have any questions, please contact this writer.

Steptoe testified that he had "problems" with the phrase therein, "prevailing wage rates," but intended to raise it at the next negotiation meeting. The March 16, 1981, letter led to a telephone conversation between Steptoe and Van Horn wherein they agreed to return to the bargaining table on April 16, 1981. On April 13, 1981, Van Horn telephoned Steptoe and canceled the meeting and merely explained he had "problems." Steptoe stated that Respondent was willing and available to meet with the Union. However, Van Horn declined to meet further. Van Horn testified that the former unit employees remained on strike thereafter.

F. *Respondent's Motivation*

It is conceded that Respondent was motivated by economic and business reasons with respect to its decision to subcontract unit work. As to Respondent's reasons for the timing of the decision to subcontract, the testimony of Vice President Greer is uncontroverted and credible. Greer testified that, had the Union asked for an extension of time within which to request bargaining over the decision to subcontract, Respondent would have agreed to it. However, he explained that his "clear impression" based on two bargaining sessions was that the Union had no desire to bargain about the decision to subcontract and that Respondent was subjected to pressures to get its campus cleaned up and repaired by mid-August for the coming semester. During the strike Respondent resorted to the use of volunteer students and five strike replacements (four of whom were custodians) to supplement the three nonstriking unit employees in order to maintain minimal maintenance and custodial services. The student body remained on campus until the first week of May. There were 100 students on campus for the 2-week summer "inter term." On the weekend of May 30, 700 accommodations were rented to high school bands for a state festival. Thereafter, 150 accommodations were provided to church groups for a church camp from early June to August 12. Additionally, Respondent's own basketball and football youth camps utilized the facilities. The summer school session commenced June 15 as did Respondent's "high school upper bound" program which involved use of the campus buildings. A state square dance festival occurred on the campus during the first weekend in August. There were 110 students who utilized the facilities for the varsity football program.

Concurrently, Respondent was obliged to repair and paint the residence facilities, which were occupied and in continuous use up to the end of June. Accordingly, painting, plumbing, carpentry, and electrical repairs had to be executed in a 6-week period from July 1 to August 15. One hundred and fifty dorm rooms needed painting plus the corridors, at a rate of four or five rooms a day. A 2-week startup period by Columbus was estimated. Time was running out and Greer was under pressure to get the campus in order at the time the Union was given the July 7 deadline. Greer admitted that the 10 a.m. deadline was arbitrary, but that it was set with the knowledge that the campus had to be in fit condition by August 15, and in the face of what he assumed was a lack of union objection to such deadline. Greer testified that the decision to adhere to the deadline and to make the July 7 decision to subcontract irrevocable was based upon Respondent's moral commitment to Columbus on July 7 within the context of the mounting pressures to clean up and repair the campus. He gave no consideration to the possibility of hiring Columbus on a temporary basis and solicited no information from Columbus as to their desire to perfrom services on a temporary basis, or as to the cost of such temporary services.

Analysis

Section 8(a)(5) and (1) of the Act obliges an employer to notify and consult with the employees' exclusive bargaining agent concerning changes in wages, hours and conditions of employment. *N.L.R.B.* v. *Benne Katz, Alfred Finkel, and Murray Katz, d/b/a Williamsburg Steel Products Company*, 369 U.S. 736 (1962). That obligation has been extended to an employer's decision to replace employees by subcontracting bargaining unit work to another employer. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964).[3] The bargaining concerning the decision to subcontract unit work, of course, presupposes good faith. The General Counsel argues that Respondent herein did not engage in good-faith bargaining because it entered negotiations with a fixed intent to subcontract unit work regardless of the Union's bargaining efforts to dissuade it from subcontracting, as is evidenced by dishonest representations in negotiations, by the imposition of unreasonable deadlines that it was unwilling to extend, by the negotiation of a final and complete subcontract before meeting with the Union, and by the withholding of information which was necessary and relevant to negotiations over subcontracting.

The General Counsel contends that Respondent's representations with respect to its administrative costs, and supplies costs were misleading, if not false. Respondent represented its estimate of administrative costs as 93 percent of the direct labor cost. It based this calculation, not on actual discernible administrative costs, but on the indirect cost rate Respondent was allowed to charge the United States Department of Health, Education and Welfare (DHEW) to administer Government grants and programs. Greer testified that the 93-percent rate charged for such programs involving teaching programs was analagous to similar administrative overhead costs for the maintenance department. The General Counsel correctly observes that different factors are involved in teaching programs than are involved in the maintenance of a physical plant, i.e., maintenance costs are part of the

[3] An obligation to bargain may not exist, however, where an employer, for economic reasons, decides to shut down a part of its business and thus change the scope and direction of the enterprise. *First National Maintenance Corp.* v. *N.L.R.B.*, 425 U.S. 66 (1981).

overhead of the education department but it is not appropriate to include maintenance costs as overhead for maintenance work. The General Counsel asks that, since Greer had admitted in his testimony that Respondent's auditors had prepared summaries for DHEW of the actual costs of operating a physical plant department, why did not Respondent rely on that underlying data the July 3 negotiations. Accordingly, the General Counsel argues that Respondent's position in bargaining with respect to administrative costs evidences bad faith.

Clearly, there are administrative costs involved in maintaining a maintenance department. That is not questioned. Certainly, Respondent utilized an imperfect analogy when it relied on a 93-percent administrative overhead factor. However, Respondent did not represent to the Union that 93-percent factor was computed by an actual study of the maintenance department exclusively. It clearly identified the basis for the 93-percent factor. The Union speedily evaluated that factor as being excessive and called it a "phantom" figure. Respondent in response explained that, even if the total administrative costs of the maintenance department were not considered, the subcontract saved enough money in supervisors' salaries to make it more economical than would be the retention of unit work at the labor costs entailed in the collective-bargaining agreement. The Union did not challenge that assertion. Respondent did not produce underlying cost data on administrative costs because the Union did not request production of it and because the Union offered no challenge to Respondent's assertion of economic benefits notwithstanding the discounting of the 93-percent asserted weekend factor. Furthermore, Respondent enumerated a wide range of noneconomic advantages of subcontracting which the Union did not challenge.

With respect to the $130,000 cost of materials estimate cited by Respondent in negotiations, the General Counsel premises his argument of misrepresentation upon testimony of Greer elicited by Respondent for the purpose of demonstrating prospective costs that might be incurred in the event a *status quo ante* order would be rendered by the Board. Greer testified that incidental to a restoration of the unit work would be the costs of $20,000 for cleaning supplies, custodial waxes, cleaners, paper products, lights, carpentry, plumbing, and electrical supplies; $7,500 for a floor buffer and six lawn mowers; and $40,000 for a bus. These costs are far below the $130,000 figure stated in negotiations by Steptoe. However, it is not clear from the record that these costs comprised the total cost of supplies for the first year of subcontracting, or that they were part of the total supply cost, or an addition to the normal cost of supplies. The record indicates that extensive painting, plumbing, electrical, and carpentry costs were necessary for the maintenance of the dormitories during the summer of 1980. These costs are not encompassed within the costs described by Greer in his testimony concerning the expenses that might be caused by a restoration of unit work. Thus, I cannot find that Respondent's citation of a $130,000 costs of supplies was false or misleading. The Union did not challenge or question that figure when it was presented with it on July 3.[4]

The General Counsel argues that Respondent misrepresented to the Union the status of its negotiations with Columbus, particularly on June 30 by indicating that the "price" and "remaining details" were subjects to be discussed further. However, a review of the entire discussion of June 30 and July 3 reveals that the Union was apprised that Respondent viewed with some urgency the need to clean up its facilities and that it was well down the road with respect to obtaining a final offer by Columbus. In the meeting of July 3, the Union was presented with citations of costs and comparative costs. Thus, Respondent did not mislead the Union by suggesting that an agreement to subcontract was remote in time or probability. Steptoe took pains to explain to the Union that no irrevocable decision to subcontract had been made and that Respondent was receptive to countervailing arguments. Thus he used such terminology as "the possibility of subcontracting." However, I conclude that there was no effort to mislead the Union as to Respondent's strong inclination to enter a subcontract and of its desire to make a decision to either subcontract or retain unit work quickly.

The General Counsel argues that the note of urgency as expressed by Steptoe in negotiations, i.e., "let's move it, we have a campus to clean up," evidences an overall attitude of bad faith. I do not agree. Respondent's desire for expedition was understandable and justifiable. After a lengthy period of negotiating with the Union during which time there is no contention that it bargained in bad faith, no contractual agreement had been reached. A crisis was imminent. The Union surely must have been aware that the fall term was imminent. I cannot conclude that under these circumstances the request for expedition in negotiations revealed bad faith.

With respect to the contention that Respondent imposed an unreasonable deadline upon the Union, I am unpersuaded by the General Counsel's argument. There was justification for expedition in negotiations. It is understandable that Respondent desired to reach a resolution quickly. The Union was notified that Respondent was entertaining a decision to subcontract sometime between June 16 and June 20. A meeting was called in consequence of that notification. A union that has had notice of an employer's proposed change in a term or condition of employment must timely request and diligently pursue bargaining if it wishes to preserve its right to bargain on that subject. *American Buslines, Inc.*, 164 NLRB 1055 (1967); *City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1977).

From the first notification to the conclusion of the July 3 negotiation session, the Union revealed that it did not desire to negotiate the matter of subcontracting but rather wished to pursue collective-bargaining negotiations divorced from the subcontracting issue. It sought no opportunity to propose alternative solutions aside from a slight modification of its wage proposal which

[4] It is noted that Columbus' estimate of Respondent's costs for materials and supplies for the 1979–80 year were $126,000 which obviously is quite close to the $130,000 estimate for 1980–81.

had little impact on the economic attractions to subcontracting and no impact on the noneconomic advantages to be accrued from outside maintenance service. The deadline was not imposed as an ultimatum. It was, rather, an offer of one final opportunity to negotiate before the decision to subcontract became irrevocable. The union negotiators mutely acquiesced in that deadline. Peluso's cryptic assertion that a union attorney might disagree with his lack of desire to negotiate the subcontracting of unit work falls far short of a demand for further negotiations. Indeed, the final word on July 3 from Van Horn indicated a strong aversion to such further bargaining. Thus there was no request to Respondent to hold open its decision beyond the proffered time. There was no acceptance of Steptoe's offer to negotiate throughout the weekend. The meeting of July 3 itself ended on Peluso's announced intent to go on a vacation on Monday, July 7, and on his apparent jocular reference to the unpleasant future visit by some of his "Teamster buddies" to the campus. It was only after Van Horn returned from a 3-day horse show that he apparently had some second thoughts and telephoned an attorney and thereafter informed Steptoe that the Union was "willing" to negotiate the decision to subcontract.

Based on the facts of this case, I cannot conclude that the Union was provided with an inadequate opportunity to bargain by the imposition of an unreasonable deadline. Furthermore, I do not conclude that Respondent's refusal to negotiate the subcontracting decision after 10 a.m., July 7, breached its bargaining obligations. I conclude that the Union had been provided an adequate opportunity and had by its statements at the bargaining table rejected that opportunity. I conclude that Respondent did not act arbitrarily or in bad faith by adhering to a deadline which was implicitly agreed to by the Union. I conclude that Greer's explanation for adhering to an oral commitment to Columbus within the context of a need to expedite campus maintenance and an expressed disinterest in bargaining by the Union does not manifest bad faith.

I cannot substitute my business judgment for that of Respondent's business judgment in order to conclude that Respondent should have or could have entered into a temporary contract with Columbus, or that it should have hired more strike replacements while continuing with the contract negotiations. It is conceded that Respondent entered into a subcontract for economic reasons. I have no evidence before me on which to conclude that a temporary contract would have been available at the same advantageous rates. Finally, I cannot view with the same skepticism, as expressed by the General Counsel, Greer's testimony that Respondent conducts its business in a manner by which it abides by its word. There is no evidence herein to the contrary, and such concepts of "moral" behavior are not inherently unbelievable.

The General Counsel argues that Respondent could have subcontracted for a temporary period of time, or could have hired replacements, or could have slowly phased out unit work. The General Counsel is correct. However, one of the things Respondent could and did do was to subcontract its unit work for nondiscriminatory reasons after having given the Union an adequate notice and opportunity to bargain over the decision to subcontract.

The General Counsel contends that Respondent's fixed intent to subcontract unit work regardless of the bargaining position of the Union is evidenced by the negotiations of a complete subcontracting agreement with Columbus before it had met with the Union. The General Counsel cites the Board's decision in *ABC Trans-National Transport, Inc.*, 247 NLRB 240 (1980), wherein the Board adopted Administrative Law Judge Julius Cohn's Decision wherein Administrative Law Judge Cohn held that an employer who gave a union only a few days' notice of a decision to subcontract that had already been made had not afforded the union with "the opportunity to bargain during the critical time when such bargaining perhaps could have been productive, that is, the period when the decision was being considered and about to be made." (247 NLRB at 242) The General Counsel also cites the language of Administrative Law Judge Thomas S. Wilson in *Edward Axel Roffman Associates, Inc.*, 147 NLRB 717, 723 (1964), who in analyzing *Town & Country Manufacturing Company, Inc.*, 136 NLRB 1022, decision stated "if such bargaining is to be of any value, such negotiations should antedate any final determination by Respondent . . ." and "If then the notification and negotiation with the Union . . . is to be more than a perfunctory gesture, it would seem necessary for Respondent to have opened negotiations . . . [at the time when it considered the change to have become highly practicable] or at least before Respondent became irretrievably committed to the move . . . ." The Board adopted the Administrative Law Judge's ultimate decision but did not adopt his analysis of the *Town & Country* decision.

More particularly, the General Counsel relies on the recent decision of the Board in *Roman Catholic Diocese of Brooklyn, Henry M. Hald Association, Bishop Ford Central Catholic High School*, 236 NLRB 1, 23–24 (1978), which he argues parallels the facts of this case. That case, however, dealt with the closing of a school. The factual situation therein is complex. However, in that case it was held that the respondent did not afford the union with sufficient time to prepare an effective proposal and to bargain in a meaningful manner. The union therein had demanded negotiations, had made numerous proposals, had requested specific information, and had raised numerous questions concerning the respondent's position. The initial proposal for the takeover of a school by the Bishop Ford's parents group had been prepared by the active participation of the Diocese. Revisions were subsequently made as a result of the efforts of the parents group and the Diocese. The union was given first notification after the proposal had been made and after the Diocese had contributed to its structure and revisions had resulted. After bargaining with the union commenced, the union was only provided with portions of the proposal. In that case it was held that the Diocese was not justified in withholding the proposal from the union because at the time that it did so it could have reasonably anticipated that the proposal would be found acceptable. Additionally, in that case the respondent de-

layed submission to the union of specific financial information which it had requested, to the point in time when the union was faced with a *fait accompli*. The Diocese imposed a deadline for bargaining to which the union futilely sought to extend.

The facts of the instant case are substantially distinguishable. The Columbus proposal of May 28 was not the product of joint efforts of Respondent and Columbus. Rather, Respondent was faced with a proposal encompassed within a sales promotion effort by Columbus. Though Respondent after reviewing the proposal may have been strongly attracted to the subcontract, I cannot conclude that Respondent had reached a point prior to notification to the Union, i.e., the week of June 16–20, where it had concluded that the Columbus proposal was satisfactory and acceptable in all aspects, nor that it became irretrievably committed to subcontracting prior to bargaining. Columbus' final cost figure and commitment to fixed cost prices for a 3-year period was not tendered until June 30. Respondent was able to present to the Union the exact options in terms of costs which were presented to it. I cannot conclude that Respondent became irretrievably committed to the subcontract at the time it presented the Union with an opportunity to negotiate. It did not withhold from the Union specific information which the Union had requested. It did not withhold the complete subcontract proposal as the General Counsel suggests. The Union's request for "correspondence" was vague, ambiguous, and not pursued. The Union was advised that Columbus had made preliminary studies but it made no demand for these studies. The Union made no demand of Respondent to set forth reasons why Respondent considered improvement in service necessary or useful. It sought no further explication or documentation of Steptoe's oral exposition of noneconomic reasons for subcontracting. It requested no financial data concerning supply and overhead costs. It asked for no extention of time to negotiate until after Respondent committed itself to an agreement with Columbus. That came after the expiration of a deadline to which the Union had acquiesced and the consequences of which it was well aware. In fact, the Union did not express a serious desire to challenge or even discuss the subcontracting decision. Under these circumstances, Respondent's failure to tender the entire Columbus feasibility study as "correspondence" cannot be found to constitute evidence of an intention to hinder or impair the Union's ability to negotiate, nor of an intention to refuse to enter into open and meaningful bargaining.

In view of the foregoing analysis, I conclude that the General Counsel's reliance on the *Roman Catholic Diocease of Brooklyn* case is misplaced. I conclude that despite the status of the Columbus offer, the evidence reveals that Respondent had not effectuated a *fait accompli* and had not irrevocably decided to subcontract unit work during the time when it offered to negotiate with the Union.[5]

[5] Compare *U. S. Contractors, Inc., and the Doro Chemical Company, U.S.A., Texas Division*, 257 NLRB 1180 (1981).

Delay and Refusal To Provide Relevant Information

A failure to furnish to the employees' designated bargaining agent requested information which is relevant to the negotiation or administration of a collective-bargaining agreement or of use in carrying out its statutory duties and responsibilities may constitute a breach of an employer's good-faith bargaining obligations under the Act. *Detroit Edison Company* v. *N.L.R.B.*, 440 U.S. 301, 303 (1979); *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Information concerning terms and conditions of employment within the bargaining unit is presumptively relevant and no specific showing of relevance is required, but as to areas outside the unit a more restrictive standard of relevance is applied. *Ohio Power Co.*, 216 NLRB 987, 991 (1975) (which involved the subcontracting of work performable by employees within the appropriate unit). In *Connecticut Light and Power Company*, 229 NLRB 1032 (1977), a request was made for detailed information concerning the subcontracting of work. In that case it was stated by the Administrative Law Judge whose Decision was adopted by the Board:

> The issue of relevancy here must . . . be determined in the entire context of the Unions' request and the measure of the Respondent's compliance under all of the circumstances attending the dispute.

In this case the Union requested, as the June 30 meeting was ending, copies of all correspondence between Respondent and Columbus. It asked for no specific data. It requested no information as to the preliminary studies that Steptoe informed them had been conducted by Columbus. Respondent did not thereafter provide the Union with the feasibility study which it did not consider to be "correspondence." The General Counsel argues that Respondent breached its bargaining obligation by failing to provide the Union with a copy of the May 28 feasibility study which it contends contains information which would have been relevant and useful to the Union with respect to the negotiation of the decision to subcontract unit work. It is therefore the substance of the feasibility study that the General Counsel argues is relevant and useful, not the study itself, or as a piece of correspondence. The General Counsel argues that Respondent refused to disclose the feasibility study because it wished to deprive the Union of bargaining ammunition, i.e., the information disclosed therein. The information contained in that study, however, is not of such an esoteric nature that its existence would not have occurred to a reasonably diligent bargaining agent. Thus the reasons of dissatisfaction with unit work, the noneconomic advantages to subcontracting, and the underlying financial data supporting the conclusions of economic advantages constitute information which the Union could easily have explicitly requested had it earnestly desired to engage in bargaining. The General Counsel sets forth several cogent arguments why such information might have been useful to the Union. However, I conclude that the

Union's unresurrected request of June 30 for correspondence was abandoned by it during the July 3 bargaining session as it was jettisoned by the Union along with any real desire to negotiate the subcontracting decision. It is recalled that during that meeting Steptoe discussed both economic and noneconomic reasons for subcontracting such as Columbus' reputation as a subcontractor and its method of operation. The Union made no request for any underlying data or information upon which Steptoe based his arguments.

The General Counsel correctly urges that a union need not repeat a request for relevant information to which it is entitled. *De Palma Printing Co.*, 204 NLRB 31, 33 (1973). However, I conclude that the circumstances of Respondent's failure to comply with the Union's request herein, i.e., a generalized request quickly followed by a manifestation of a lack of desire to pursue negotiations, are so mitigating as to preclude a finding that it breached its bargaining obligations by failing to produce the entire feasibility study prior to July 7.

The General Counsel argues that Respondent failed to supply the feasibility study to the Union subsequent to the July 7 union request for "relevant" documents. As I have concluded that Respondent satisfied its obligation to provide the Union with an adequate opportunity to bargain concerning its decision to subcontract unit work prior to July 7, I conclude that Respondent was not obliged to negotiate further concerning the decision to subcontract. There is no allegation that Respondent refused to bargain concerning the effects of subcontracting unit work. Indeed, the Union's conduct thereafter indicates little desire to negotiate the effects of subcontracting, although a formal request was made by the Union to negotiate the decision and effects of subcontracting. Rather, it appears that the Union clung to the position that the parties were still in negotiations for a collective-bargaining agreement and that the unit employees remained strikers. The request for "relevant documents" seem to have been directed to the issue of the subcontracting decision. The feasibility study is relevant to that issue, and not clearly relevant to negotiations as to the effects of subcontracting. I conclude that Steptoe's conduct in deferring a request for clarification is justified in the circumstances of this case, particularly when the Union did not indicate the nature of information that it desired and when it became increasingly doubtful that the Union wanted to discuss the effects of subcontracting as evidenced by long periods of unavailability. The General Counsel does not argue that the Union was entitled to information concerning, *inter alia*, Columbus wage scales, nor the letter from Columbus concerning the hiring of its employees at Salem. That information does not appear relevant either to the effects of subcontracting or the decision to subcontract. Accordingly, I conclude that Respondent did not breach its bargaining obligations by withholding information relevant to negotiations concerning the effects of subcontracting after July 7.

For the foregoing reasons, I conclude that Respondent has not violated the Act as alleged in the complaint as amended, and I hereby issue the following recommended:

ORDER[6]

The complaint is dismissed in its entirety.

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.